

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

IN RE:)	
)	
FAIROFFERCASHNOW, INC.,)	
)	
Debtor.)	
)	
FAIROFFERCASHNOW, INC.,)	Case No. 3:24-bk-03495
)	Chapter 11
Plaintiff,)	JUDGE WALKER
)	
v.)	ADV. NO. 3:24-ap-90155
)	
JUSTIN CUTLER,)	
)	
Defendant.)	
)	
and)	
)	
JUSTIN CUTLER,)	
)	
Counter/Third-Party Plaintiff,)	
)	
v.)	
)	
FAIROFFERCASHNOW, INC.,)	
BRADLEY SMOTHERMAN, and)	
CASEY SMOTHERMAN,)	
)	
Counter/Third-Party Defendants.)	

**COUNTER-DEFENDANT FAIR OFFER CASH NOW, INC.’S
RULES 9(b) AND 12(b)(6) MOTION TO DISMISS**

Plaintiff/Counter-Defendant, Fair Offer Cash Now, Inc. (“FOCN”), by and through its undersigned counsel, respectfully moves this Honorable Court, pursuant to Fed. R. Civ.

P. 12(b)(6), Fed. R. Civ. P. 9(b), Fed. R. Bky. P. 7012, and Fed. R. Bky. P. 7009, to dismiss the entirety of Defendant/Counter-Plaintiff Justin Cutler's ("Cutler") Counterclaim [ECF Dkt. No. 6] for failure to state a claim as a matter of law. In support thereof, FOCN states as follows and also submits a concurrently filed Memorandum of Law in Support of the instant Motion.

1. Cutler's Counterclaim fails to state a claim upon which relief may be granted pursuant to Rules 9(b) and Rule 12(b)(6).

2. There are multiple grounds for this Motion warranting dismissal of the Counterclaim. First, Cutler's counterclaim for breach of contract (Count II) fails as a matter of law because the subject loans (other than one particular loan – the Oscar Green Loan – which will be the subject of a separately filed motion for judgment on the pleadings) are usurious on their faces and therefore void and unenforceable under Tennessee law.

3. Second, Cutler's counterclaims for breach of contract and fraud in the inducement (Count IV) fail to plead sufficient facts to state a claim. Cutler pleaded these claims in a completely conclusory manner, including the failure to allege the existence of valid and legally enforceable contracts or the manner in which FOCN allegedly breached the contracts. Additionally, Cutler's claim for fraud violates Rule 9(b) because Cutler failed to plead the fraudulent inducement claim with the requisite particularity, including the fundamental "who, what, where, when, how" necessary to establish this claim at the pleadings stage.

4. Finally, Cutler's counterclaim for fraud in the inducement also must necessarily fail as a matter of law because Cutler could not have reasonably relied on an

illegal lending scheme, and FOCN's alleged statements could never have been material to the alleged transactions. Under Tennessee law, usury is a strict liability statute, and a borrower's knowledge, consent, or cooperation in a scheme of usury are immaterial. Therefore, Cutler cannot establish any reasonable reliance or materiality of any of FOCN's statements pertaining to Cutler's usurious lending as a matter of law.

5. For these reasons, and those set forth more thoroughly in its concurrently filed Memorandum of Law in Support of this Motion, FOCN respectfully requests this Honorable Court dismiss Cutler's Counterclaim in its entirety and with prejudice.

Respectfully submitted:

s/ J. Brad Scarbrough

J. Brad Scarbrough, BPR# 20980

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CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2025, a true and correct copy of the foregoing was served on the following by this Court's CM/ECF system and by U.S. mail (as noted):

By ECF:

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s/ J. Brad Scarbrough